Supreme Court, U.S.
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No.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1995

MISSOURI PACIFIC RAILROAD COMPANY,
*Petitioner,*

vs.

ROBERT SHEPHERD,
*Respondent.*

Petition for Writ of Certiorari to the
Appellate Court of Illinois, Fifth District

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

In eight recent Federal Employers Liability Act cases, the Illinois Appellate Court, Fifth District, has either affirmed a lower court's decision to withhold a liability issue from the jury, or set aside a jury determination of liability itself.

Whether, in this case, the Illinois Appellate Court, Fifth District, violated the litigants' statutory right to a jury trial under the Federal Employers Liability Act by preventing a jury decision on the negligence of the railroad employer.

## RULE 29.6 LISTING

The parent company of Petitioner Missouri Pacific Railroad Company is the Union Pacific Corporation.



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## OPINIONS BELOW

The order of the Illinois Supreme Court denying discretionary review (Appendix, *infra*, A-1) is not reported. The opinion of the Illinois Appellate Court, Fifth District (Appendix, *infra*, A-2 - A-19) is not reported.

## JURISDICTION

The order of the Illinois Supreme Court denying discretionary review of the judgment of the Illinois Appellate Court, Fifth District, was entered on April 3, 1996. The judgment of the Illinois Appellate Court was entered on December 12, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(a).

## STATUTORY PROVISION INVOLVED

45 U.S.C. Section 51 provides:

"Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees."

"Every common carrier by railroad while engaging in commerce between any of the several States and Territories, or between any of the States or Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in the case of death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of

the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, road bed, works, boats, wharves, or equipment."

## STATEMENT OF THE CASE

### The Evidence

On March 6, 1989, respondent Robert Shepherd, was working as a switchman for petitioner Missouri Pacific Railroad Company at the Lesperman Street Yard in St. Louis, Missouri. (R373, 374) It was snowing and sleeting that day. (R377) Shepherd and the other members of his crew, Glen Violett and Lamont Collins, were making up an extra train. (R375) Shepherd was the foreman of this crew. (R153) As the foreman, for safety reasons, Shepherd was to keep watch over people in the area of train movements. (R376) Shepherd saw Robert Hall, a carman in a different crew, walking in the yard. (R376) At some point, Shepherd lost sight of Hall. (R376) As soon as he saw Hall disappear, Shepherd radioed the engineer, Violett, to stop the train. (R376) Then, Shepherd and Collins went to look for Hall. (R377)

Hall was doing carman's work on March 6, 1989. (R110) After he had released the brakes on the engines of a train, he began walking to a roadway where his co-worker was going to pick him up. (R114-115) As Hall was walking to the roadway, all of a sudden, his leg disappeared from under him. (R115-116) At that time, he saw a dark spot in the snow which he had not seen before, and he fell into a hole. (R115-116) It was daylight out, between 10:30 and 11:00 a.m., when Hall fell into the hole. (R116) He did not see anything but snow before his foot went down into the hole. (R 116) The snow was blowing in the yard and the visibility was poor. (R133) The snow was so deep that day that some employees could not make it in to work. (R178)



Shepherd and Collins saw Hall down in the snow. (R132, 377) Shepherd ran ahead of Collins and was the first person to get to Hall. (R132, 378) When Shepherd got there, Hall had one leg and both arms out of the hole. (R378) Hall was out of the hole from his chest upwards. (R423)

Shepherd testified he lifted and drug Hall out of the hole. (R381) Collins did not see Shepherd pull Hall out of the hole. (R136-137) He just saw Shepherd bend over and reach down to Hall. (R137) Hall thought Shepherd got him out of the hole, but did not remember how. (R121-123)

According to measurements later taken by Shepherd, the hole was eighteen inches wide and eight feet, eight inches deep. (Pl.Ex. 7, 13) It was normally covered by a steel plate. (R113) The plate weighed about forty pounds. (R168) The hole was in an area used by the workers as a walkway and also as a roadway for driving vehicles on. (R129, 162, 172) The hole itself was drilled for use by the environmental people to sample the water levels. (R180)

In the summer of 1988, Bernard Jackson, a carman, was driving a vehicle in the area of the hole when he ran over something. (R162-163) He got out to inspect what it was he ran over. (R163) Jackson saw the hole open and its cover laying a foot or two away from it. (R163) He did not know if he ran over the open hole or just ran over the lid and knocked it off. (R165) Jackson replaced the lid and reported the hole to a foreman. (R166)

The hole was off to the side of the driveway the trucks used. (R171-172) One or two weeks before Hall's accident, Martin Cliffe, a retired train yard foreman, saw a truck back up over the covered hole and knock the lid off of it. (R175-176, 179) Cliffe put the lid back on and called to report the truck knocking the lid off. (R176, 177, 180) He called the Water Service Department which would have been involved in making repairs to better

secure the lid. (R177, 179) However, the person who answered the phone was an electrician who said no one from Water Service was there. (R. 177, 179) The electrician said he would pass Cliffe's message on to Water Service. (R177) Cliffe had called Water Service for these types of things on many occasions and they normally responded very well. (R179)

Cliffe cautioned his workers about the cover. (R177) The workers would replace the cover if they saw it off. (R177-178) Cliffe did not see the cover off the hole on any other occasions before Hall's accident. (R177) The day after Hall's accident, Cliffe's department, the car department, secured the lid better. (R181)

Shepherd claimed he hurt his back pulling Hall out of the hole. (R138, 150) The jury returned a verdict assessing Shepherd's damages at Eight-Hundred Fifty-Five Thousand Thirty-Eight Dollars ($855,038). (C729)

**How The Federal Question Was Presented**

Missouri Pacific asserted the federal question at every appropriate level of the Illinois court system.

Over Missouri Pacific's objection, the trial court granted Shepherd's motion for directed verdict on the issue of Missouri Pacific's negligence. (R669) In granting the motion for directed verdict, the trial court relied heavily on the case of *Fulton v. St. Louis-San Francisco Ry. Co.* (10th Cir. 1982) 675 F.2d 1130 which held the imperiled party's negligence in endangering himself, thus prompting his rescue, is attributable to the railroad in an action brought by the rescuer under the FELA. (*Id.* at 1134) Thus, under *Fulton*, in this case, any negligence on the part of Hall in stepping into the hole would be attributable to Missouri Pacific in Shepherd's action.

The trial court did not consider the evidence from which a jury could have found Hall not negligent for failing to see the hole.



On the day of Hall's accident, it was snowing and sleeting. (R377) The snow was blowing and visibility was bad in the railroad yard. (R133) Hall testified he did not see anything but snow before he stepped in the hole. (R116) The snow was so deep that day that some employees could not make it into work. (R178)

Missouri Pacific raised the federal question in the Illinois Appellate Court, Fifth District, by appealing the order of the trial court denying its motion for a new trial. (C684, 693) The Illinois Appellate Court found the directed verdict was proper. It imputed to Missouri Pacific the knowledge of Jackson and Cliffe that the hole cover was displaced twice when a truck drove over it. (App., A-7) The Appellate Court also noted Cliffe's testimony that when uncovered, the hole presented a dangerous condition for employees. (App., A-7) It concluded the "manhole cover condition was clearly foreseeable and constituted a dangerous condition as shown by the Railroad employees' admissions." (App., A-8)

The Appellate Court did not believe a determination of Hall's negligence was necessary in entering a directed verdict on Missouri Pacific's negligence. (App., A-8)

## REASONS FOR GRANTING THE WRIT

### I. THIS CASE PRESENTS A TIMELY AND UNIQUE OPPORTUNITY FOR THE COURT TO REASSERT ITS COMMITMENT TO THE STATUTORY RIGHT TO TRIAL BY JURY IN FELA CASES, AS CONGRESS INTENDED.

Prior to 1969, this Court granted certiorari in cases arising under the Federal Employers Liability Act (FELA) and its maritime companion, the Jones Act, on the ground that the lower courts were persistently depriving the litigants of their right to a jury determination of liability, thus frustrating Congress' intent to vest the power of decision in these actions in the jury. See, *Wilkerson v. McCarthy*, 336 U.S. 53, 69 S.Ct. 413, 93 L.Ed. 497 (1949); *Harris v. Pennsylvania R. Co.*, 361 U.S. 15, 80 S.Ct. 22, 4 L.Ed. 2d 1 (1959); *Rogers v. Missouri Pac. R. Co.*, 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed. 2d 493 (1957) Since 1969, however, certiorari has not been granted in any FELA case to review the evidence to ensure that the litigants' statutory right to a jury trial has been respected. The failure to grant certiorari in recent terms in these type of cases cannot reflect that this Court is no longer committed to preserving the statutory right to jury trial as Congress intended. It must be that no lower court judgment has attracted the Court's attention to the issue.

In a series of recent FELA cases, this one being a prime example, the Appellate Court of Illinois, Fifth District, has persistently either affirmed a lower court's decision to withhold a liability issue from the jury, or set aside the jury's determination of liability itself. See, *Shepherd v. Missouri Pac. R.R. Co.*, No. 5-94-0479 (Ill.App. Dec. 12, 1995) (directed verdict in favor of the plaintiff on liability affirmed); *Edwards v. Alton & Southern Ry. Co.*, No. 5-94-0304 (Ill.App. Oct. 05, 1995) (directed verdict in favor of the plaintiff on liability affirmed) *Luther v. Norfolk and Western Ry. Co.*, 272 Ill.App.3d 16, 649



N.E.2d 1000 (Ill.App. 1995) (directed verdict in favor of the plaintiff on contributory negligence affirmed); *Hiles v. Norfolk and Western Ry. Co.*, 268 Ill.App.3d 561, 644 N.E.2d 508 (Ill.App. 1994) (directed verdict in favor of the plaintiff on liability affirmed) *rev'd* No. 95-6 (Feb. 27, 1996), ___ U.S ___, 116 S.Ct. 890, ___ L.Ed.2d ___; *Pruett v. Norfolk and Western Ry. Co.*, 261 Ill.App.3d 29, 632 N.E.2d 652 (Ill.App. 1994) (directed verdict in favor of the plaintiff on contributory negligence affirmed); *O'Ryan v. CSX Transp. Co.*, 255 Ill.App.3d 214, 626 N.E.2d 374 (Ill.App. 1993) (set aside jury verdict on contributory negligence of the plaintiff) *vacated* 155 Ill.2d 565, 630 N.E.2d 443 (Ill. 1994); *Wilson v. Missouri Pacific Railroad Company*, No. 5-92-0615 (Ill.App. Sep. 15, 1994) (set aside jury verdict on contributory negligence of the plaintiff) *rev'd* No. 78028 (Ill. Jan. 18, 1996); *Uhrhan v. Union Pac. R.R. Co.*, 230 Ill.App.3d 725, 596 N.E.2d 221 (Ill.App. 1992) (set aside jury verdict on plaintiff's contributory negligence) *rev'd* 155 Ill.2d 537, 617 N.E.2d 1182 (Ill. 1993)

In this case, the Appellate Court of Illinois, Fifth District, affirmed the circuit court's decision to prevent a jury finding on the issue of the employer's negligence, the very issue which this Court held should be left exclusively in the jury in all but the infrequent case where fair minded jurors cannot honestly differ. *Rogers*, 352 U.S. at 510 This Court must exercise its power to review the evidence in this case and compel the Illinois Appellate Court, Fifth District, to respect FELA litigants' statutory right to trial by jury. It is also vital for this Court to reassert its commitment to the statutory right to decision by jury in FELA cases in order that other lower courts honor Congress' intent.

### A. The Illinois Appellate Court Improperly Prevented a Jury Decision on Whether a Forty Pound Cover Coming Off a Hole Two Times Over an Eight Month Period, But Always Being Replaced, Made it Foreseeable that an Employee Would be Injured.

A plaintiff's prima facie case under the FELA includes the element of foreseeability. The plaintiff must prove that the railroad, with the exercise of due care, could have reasonably foreseen that a particular condition could cause injury. *Davis v. Burlington Northern Inc.*, 541 F.2d 182, 185 (8th Cir. 1976) The defendant's duty is measured by what a reasonably prudent person should or could have reasonably anticipated as occurring under like circumstances. *Id.*

In this case, the Appellate Court of Illinois concludes there was no question of fact on whether Missouri Pacific should have reasonably foreseen that the condition of the hole cover could cause injury. On the contrary, viewing the evidence in the light most favorable to Missouri Pacific, reasonable jurors could disagree on whether Missouri Pacific should have reasonably anticipated an employee injury due to the condition of the hole cover.

It must be noted that the harm at issue was stepping into an *open* hole. There was no allegation or evidence that anyone could get hurt while the hole was covered. In all of the years the hole had been present, the cover came off only two times. However, on each of those two occasions, the open and obvious condition of the hole, when uncovered, was always observed, and the cover was replaced. No accidents or injuries involving the hole had occurred during the period of years prior to Hall's accident.



Once Cliffe observed the cause of the cover coming off the hole[1], he reported it for repair. In the meantime, he warned the employees to avoid the cover, and to replace it over the hole if it came off again.

It was not until a bad snowstorm in March that the hole became uncovered and hidden from view by the blowing and drifting snow. There was no evidence of when or how the hole came to be uncovered. Nor was there any evidence Missouri Pacific was aware of the cover being off after Cliffe replaced it the week before.

When viewing the above stated evidence and inferences therefrom in the light most favorable to Missouri Pacific, the evidence on the issue of the foreseeability of an employee injury from the condition of the hole cover did not so overwhelmingly favor Shepherd that no contrary conclusion based on that evidence could ever stand. Reasonable jurors could differ on whether the cover coming off a total of two times over a period of eight months, and being immediately replaced, made it foreseeable that an employee would be injured.

The Appellate Court relies heavily on Cliffe's testimony that the cover had a tendency to come off any time a truck drove over it. (R175) However, Cliffe's testimony was based on his having seen a truck knock the cover off only one time. (R176-177, 179, 180) A single occurrence can hardly be characterized as a recurrent problem as the appellate court suggests. Even when taken in conjunction with Jackson's testimony that he had also once seen the cover off the hole some eight months before Cliffe did, the question of the foreseeability of it happening again and

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[1] Contrary to the Appellate Court's statement, Jackson did not know what caused the cover to be off the hole. All he knew was he ran over something, either the open hole, the lid or something else, and when he got out to see what he had run over, the lid was laying adjacent to the hole, and the hole was uncovered. (R. 165)

not being replaced was not subject to only one reasonable conclusion. The jury heard testimony that the lid was not located directly in the driveway the trucks used, that Cliffe had cautioned his truck drivers to avoid the lid, and that in the past, each time the lid was off, that fact was observed and the lid was replaced.

### B. Whether Missouri Pacific Acted as a Reasonable Person in Not Permanently Securing the Hole Cover, but Instead Temporarily Securing it and Warning the Employees About it, Was a Question of Fact for the Jury.

Whether the railroad used reasonable care in furnishing its employees a safe place to work is normally a question for the jury, and the right of the jury to pass on this issue must be liberally construed. *Sinclair v. Long Island R.R.*, 985 F.2d 74, 77 (2nd Cir. 1993) What the railroad knew or should have known, and whether it exercised reasonable care in light of its knowledge, are questions of fact upon which reasonable jurors could differ. *Id.*

In this case, whether Missouri Pacific exercised reasonable care in light of its knowledge of the condition of the hole cover was a question of fact upon which reasonable jurors could differ. There was a period of eight months from the time Jackson saw the cover off the hole and the time Cliffe saw the cover off the hole. Both times, the cover was replaced. The cover was reported for repair after Cliffe's observation. It was one or two weeks between the time Cliffe discovered the condition of the cover and the time Hall was injured. During that one or two week period, the employees temporarily made sure the cover was always on the hole. The employees were also warned about the condition of the cover. Whether Missouri Pacific acted reasonably in not permanently securing the cover for one or two weeks, but instead temporarily securing it and warning the employees about it, was a question of fact for the jury.



### C. Reasonable Jurors Could Arrive at Different Conclusions on Whether Shepherd's Co-employee was Negligent in Failing to See an 18 Inch Wide Hole Obscured by Blowing and Drifting Snow and Poor Visibility in the Railroad Yard.

In granting Shepherd's motion for a directed verdict, the trial court relied heavily on the case of *Fulton v. St. Louis-San Francisco Ry. Co.*, 675 F.2d 1130 (10th Cir. 1982) which held the imperiled party's negligence in endangering himself, thus prompting his rescue, is attributable to the railroad in an action brought by the rescuer under the FELA. (*Id.* at 1134) Thus, under *Fulton*, in this case, any negligence on the part of Hall in stepping into the hole would be attributable to Missouri Pacific in Shepherd's action. What the trial court ignored is the jury could have found based on the evidence presented that Hall was not negligent either. When the jury finds that the fellow-servant was not negligent, there can be no negligence imputed to his employer. *Powers v. Schoolman*, 875 F.2d 1262, 1267 (7th Cir. 1989).

On the day of Hall's accident, there had been a heavy snowstorm. The snow on the ground was so deep that some employees could not make it into work. The snow was blowing and the visibility was bad in the railroad yard. (R133) Hall did not see anything but snow before he stepped in the hole. (R116) As his foot went down in the hole, Hall saw a dark spot in the snow which he had not seen before. (R133) Viewing Hall's testimony[2] and the other evidence in the light most favorable to Missouri Pacific, a reasonable jury could have inferred that the blowing and drifting snow around the hole in combination with

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[2] Over the defendant's objection, Hall's testimony was presented by way of his deposition given in his own lawsuit arising out of the same incident. (R657, 658) Therefore, no elaboration on that testimony was possible at Shepherd's trial.

the poor visibility prevented Hall from seeing there was an open hole. This Court cannot say that no reasonable juror could arrive at the conclusion that Hall was not negligent in failing to see an 18 inch wide hole obscured by snow and poor visibility.

Moreover, the *Fulton* court did not direct a verdict for the plaintiff on the issue of the railroad's negligence based on the rescue doctrine. In this case, since fair minded jurors could also differ on whether either Missouri Pacific or Hall were negligent, Shepherd's motion for directed verdict was erroneously granted.

In conclusion, the trial court and the appellate court violated the litigants' statutory right to a jury trial under the Federal Employers Liability Act by preventing a jury decision on the negligence of the railroad employer.

## CONCLUSION

For the reasons stated herein, certiorari should be granted.

Respectfully submitted,

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May, 1996

# APPENDIX

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**APPENDIX A**

**ILLINOIS SUPREME COURT**
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April 3, 1996

Ms. Leslie G. Offergeld
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No. 80429 Robert Shepherd, respondent, v. Missouri Pacific Railroad Company, petitioner. Leave to appeal, Appellate Court, Fifth District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on April 25, 1996.

**APPENDIX B**

NOTICE

The text of this order may be changed or corrected prior to the time for filing of a Petition for Rehearing or the disposition of the same.

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

No. 5-94-0479

ROBERT SHEPHERD,
Plaintiff- Appellee,

v.

MISSOURI PACIFIC RAILROAD COMPANY,
Defendant-Appellant.

Appeal from the Circuit Court of Madison County.

No. 89-L-1840

Honorable A.A. Matoesian, Judge presiding.

**RULE 23 ORDER**

[Filed: Dec. 12, 1995]

Plaintiff, Robert Shepherd (Shepherd), filed an action against his employer, the Missouri Pacific Railroad Company (Railroad), pursuant to the Federal Employers' Liability Act (FELA). (45 U.S.C. §51 *et seq.* (1988).) Shepherd alleged that he sustained injuries and damages when he attempted to rescue a fellow employee on March 6, 1989. Shepherd's fellow employee, Robert Hall, fell into an open manhole located in the



Lesperance Street Yard in St. Louis. Shepherd sustained injuries when bending down and assisting Robert Hall out of the manhole. The case was tried in late August 1993, and the jury returned a verdict in favor of Shepherd. The trial court entered judgment on August 27, 1993. The Railroad filed a posttrial motion. On November 12, 1993, the trial court denied the Railroad's posttrial motion. The Railroad's original appeal was dismissed by this court on June 3, 1994, as premature because a motion for setoff was still pending in the trial court. After the trial court entered an order regarding the setoff, the Railroad filed its appeal.

On appeal, the Railroad contends:

(1) that the trial court erred in denying the Railroad's motion for judgment notwithstanding the verdict;

(2) that the trial court erred in granting Shepherd's motion for directed verdict as to the Railroad's negligence;

(3) that the trial court erred in instructing the jury on the rescue doctrine;

(4) that the trial court committed numerous errors with the cumulative effect of denying the Railroad a fair trial; and

(5) that the jury's verdict was excessive.

We disagree and affirm the trial court.

Judgments notwithstanding the verdict should be entered only when all of the evidence, viewed in a light most favorable to the opponent, so overwhelmingly favors movant that no contrary verdict based on that evidence could ever stand. *Pedrick v. Peoria & Eastern R.R. Co.* (1967), 37 Ill. 2d 494, 510, 229 N.E.2d 504, 51314.

On December 29, 1989, Shepherd filed his complaint against the Railroad. The complaint alleged that the Railroad negli-

gently failed to cover a manhole. The complaint further alleged that Shepherd fell into this uncovered manhole and sustained bodily injuries and damages. The Railroad was served with process on or about January 19, 1990. On January 25, 1990, Shepherd filed a motion for leave to amend his complaint to change the negligence allegations. The court granted Shepherd's motion *ex parte* on January 26, 1990, and the amended complaint was filed on that date. In the amended complaint, Shepherd alleges that he sustained injuries when assisting a fellow employee out of the manhole. The Railroad claims that it was never served with a copy of the amended complaint. On February 13, 1990, the Railroad filed a motion to dismiss or to make more definite and certain. The trial court denied this motion. The record reflects that the Railroad never filed an answer with affirmative defenses to either version of Shepherd's complaint.

The Railroad claims that Shepherd's amended complaint is void because leave to file the pleading was obtained *ex parte*. (*First Robinson Savings & Loan v. Ledo Construction Co.* (1991 ), 210 111. App. 3d 889, 892, 569 N.E.2d 304, 307.) The Railroad claims that the trial court erred by not directing a verdict or entering judgment notwithstanding the verdict because no evidence supported the original claim that Shepherd fell into the uncovered manhole.

The record clearly reflects that Shepherd did not provide the Railroad notice of his motion for leave to amend. Therefore, the January 26, 1990, order entered by the trial court was void. The amended complaint filed on that same date was also void. However, we find that the trial court did not err in denying the Railroad's motions for directed verdict at the close of Shepherd's case and at the close of all evidence because the Railroad did not make the allegations it now makes regarding the difference in pleadings and proof.

In its motion for new trial, the Railroad vaguely references the difference in Shepherd's pleadings and proof at trial. Generally,



a party is not entitled to relief based upon proof contrary to that alleged in the pleadings. (*Morris v. City of Chicago* (1985), 130 Ill. App. 3d 740, 744, 474 N.E.2d 1274, 1278 (citing *Partel, Inc. v. Harris Trust & Savings Bank* (1982), 106 Ill. App. 3d 962, 966, 437 N.E.2d 1225, 1228).) Our supreme court recognized an exception where both parties form the issues in the trial court even though the issue is not set forth in the pleadings. (*Pioneer Trust & Savings Bank v. County of Cook* (1978), 71 Ill. 2d 510, 518, 377 N.E.2d 21, 24.) A complaint that an issue was not raised in the pleadings may be waived by the objecting party's conduct at trial or by introduction of evidence on the issue. *Pioneer Trust & Savings Bank*, 71 Ill. 2d at 518, 377 N.E.2d at 24.

From January 26, 1990, discovery in this case was presented consistently with the allegations of Shepherd's amended complaint. At trial, the Railroad did not seek to limit or object to testimony supporting Shepherd's case theory. The Railroad did not file a motion *in limine* about this theory. Opening statements of both parties dealt with the fellow employee's rescue and resulting injuries. Testimony was presented without objection about the rescue. The rescued employee, Robert Hall, testified by deposition. Lamont Collins and Robert Shepherd testified live. The Railroad filed a motion for directed verdict and argued that there was no evidence that the Railroad directed Shepherd on the mechanics of removing Mr. Hall from the hole or that the Railroad was negligent in causing Shepherd to lift Mr. Hall. The Railroad also filed a motion for directed verdict at the close of all evidence and argued that Shepherd's act of pulling Mr. Hall from the hole did not equate to Railroad negligence. The Railroad's tendered instruction number 13, based upon Illinois Pattern Jury Instructions, Civil, No. 160.02 (3d ed. 1992), incorporated Shepherd's version of the incident.

We conclude that the Railroad waived the right to complain that the testimony at trial did not conform to the pleadings by its conduct during the trial in failing to object and in arguing the very

facts about which it now seeks to complain. The trial court did not err in denying the Railroad's motion for judgment notwithstanding the verdict.

The Railroad also claims that the trial court committed error by granting Shepherd's motion for directed verdict on the issue of negligence. The Railroad claims that its knowledge of the manhole cover's condition and whether it exercised reasonable care regarding the condition were questions of fact. The Railroad also claimed that whether it could have foreseen that the manhole cover's condition was likely to cause injury was a question of fact. Finally, the Railroad contends that a directed verdict was improper because reasonable jurors could differ on the issue of whether Shepherd or Hall was negligent. We disagree.

A verdict should be directed only when all of the evidence, viewed in a light most favorable to the opponent, so overwhelmingly favors movant that no contrary verdict based on that evidence could ever stand. (*Pedrick*, 37 Ill. 2d at 510, 229 N.E.2d at 513-14.) Appellate review of a directed verdict is not *de novo*. (*Johnson v. National Super Markets, Inc.* (1994), 257 Ill. App. 3d 1011, 1015, 630 N.E.2d 934, 937.) On review, the appellate court must consider the fact that the trial court saw and heard the witnesses. *Thomas v. Nelson Brothers Furniture Co.* (1988), 167 Ill. App. 3d 49, 53, 520 N.E.2d 1078, 1081 (citing *Smith v. Bishop* (1965), 32 Ill. 2d 380, 384, 205 N.E.2d 461, 463).

FELA states that every common carrier railroad "shall be liable in damages to any person suffering injury while he is employed by such carrier *** for such injury or death resulting in whole or in part from the negligence of *** such carrier or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." (45 U.S.C. §51 (1988).) The Railroad does not dispute that it had a duty to exercise reasonable care in the maintenance of Lesperance Street Yard where its employees worked. See *Beattie v. Elgin, Joliet &*



*Eastern Ry. Co.* (7th Cir. 1954), 217 F.2d 863, 865 (citing *Bailey v. Central Vermont Ry., Inc.* (1943), 319 U.S. 350, 352-53, 87 L. Ed. 1444, 63 S. Ct. 1062, 1063.

A railroad clearly operates through its agents and employees. Questions of FELA master-servant status are determined by common law agency principles. (*Kelley v. Southern Pacific Co.* (1974), 419 U.S. 318, 323, 42 L. Ed. 2d 498, 505, 95 S. Ct. 472, 476.) A principal has "knowledge of all material facts of which his agent receives notice or acquires knowledge while acting in the course of his employment and the scope of his authority." *Kuska v. Folkes* (1979), 73 Ill. App. 3d 540, 544, 391 N.E.2d 1082, 1085.

In this case, a Railroad carman, Bernard Jackson, testified that many months before this accident, he drove over the manhole cover with a truck and displaced the cover. Bernard Jackson reported the incident to a supervisor on duty. One or two weeks before Shepherd's accident, Martin Cliffe, a Railroad foreman, witnessed a truck drive over and displace the manhole cover. The truck driver was not aware that the manhole cover was displaced, and Martin Cliffe had to radio the driver. Martin Cliffe contacted the Railroad's internal water department, which was responsible for making repairs. No permanent repairs were made to the manhole cover before Shepherd's accident. At trial, Martin Cliffe testified that Railroad employees constantly walk and drive in the area of the manhole cover. He further testified that there was a tendency for the problem with the manhole cover to recur any time a vehicle drove upon the cover. Martin Cliffe admitted that the uncovered manhole presented a dangerous condition for employees.

The Railroad's employees knew that the manhole cover had a tendency to become displaced and that when uncovered, the 8-1/2-foot drop created a dangerous condition. Applying general agency principles, the Railroad employees' knowledge of the dangerous condition was imputed to the Railroad. Even slight

negligence supports an employee's FELA claim. (*Pry v. Alton & Southern Ry.* Co. (1992), 233 Ill. App. 3d 197, 218, 598 N.E.2d 484, 499, *appeal denied* (1992), 147 Ill. 2d 637, 606 N.E.2d 1235.) We find that the manhole cover condition was clearly foreseeable and constituted a dangerous condition as shown by the Railroad employees' admissions.

The Railroad further argues that the directed verdict was improper because the jury might have found that Hall was not negligent in falling in the hole. Robert Hall testified that he did not see the hole because he was primarily focused on the snow. The manhole cover was displaced. The manhole concealed by the cover was 8-1/2 feet deep. There was no evidence that the hole was obscured to Robert Hall's view. Other workers testified that on this particular day, general visibility was decreased due to the snowstorm. While there certainly is evidence tending to indicate Robert Hall's negligence, determining Robert Hall's negligence was not necessary in entering directed verdict on the Railroad's negligence.

The Railroad further argues that it could not have foreseen that Robert Hall would have disregarded a warning about the manhole cover displacement tendency. Martin Cliffe testified that he might have warned his employees about this condition. Assuming that the employees were so warned, disregard of the warning would also constitute negligence on the part of a Railroad employee. Under FELA, a coemployee's negligent job performance is attributable to the employer. (*Walaite v. Chicago, Rock Island & Pacific Ry. Co.* (1941), 376 Ill. 59, 62-63, 33 N.E.2d 119, 121.) However, again, a determination of Hall's negligence was not necessary in entering directed verdict on the Railroad's negligence.

For the reasons listed in this order, we conclude that evidence of the Railroad's negligence overwhelmingly favored Shepherd and that the trial court properly directed a verdict on the Railroad's negligence in Shepherd's favor.



The Railroad next claims that the trial court erred by overruling its objection to Shepherd's tendered instruction number 14. Shepherd's tendered instruction 14 is not a pattern jury instruction and was based upon three cases: *Cox v. Stutts* (1985), 130 Ill. App. 3d 1018, 474 N.E.2d 1382; *McGinty v. Nissen* (1984), 127 Ill. App. 3d 618, 469 N.E.2d 445; and *Fulton v. St. Louis-San Francisco Ry. Co.* (10th Cir. 1982), 675 F.2d 1130. The jury was instructed, "If you find that plaintiff acted reasonably in undertaking the rescue of his co-worker, you may not find plaintiff guilty of contributory negligence for performing such rescue." The Railroad challenges this instruction on the grounds that it misstated the law, that the instruction invaded the province of the jury by directing the jury to assume that there was a rescue, and that it was unnecessary in light of the trail court's other instructions on negligence and contributory negligence.

The record reflects that the Railroad objected to this instruction only on the basis that the instruction was unnecessary in light of other instructions given by the trial court. The first two allegations of error raised on this issue were not raised at the trial court. Objections not raised in the trial court are waived and cannot be argued for the first time on appeal. (*Richard v. Illinois Bell Telephone Co.* (1978), 66 Ill. App. 3d 825, 832, 383 N.E.2d 1242, 1249.) Therefore, we need not consider the Railroad's first two allegations of instructional error.

"Under the 'rescue doctrine,' a rescuer who is injured while attempting to save an imperiled party may recover from a third party whose negligent conduct places the party in peril." (*Fulton v. St. Louis-San Francisco Ry. Co.* (10th Cir. 1982), 675 F.2d 1130, 1133-34.) In a FELA railroad case, the rescuee's negligence in endangering himself is imputed to the railroad. (*Fulton*, 675 F.2d at 1134.) A jury cannot assess comparative fault against the rescuer unless his conduct in performing the rescue was wanton or reckless. *Wharf v. Burlington Northern R.R. Co.* (9th Cir. 1995), 60 F.3d 631, 635.

The purpose of jury instructions is to advise the jury of the principles of law without misleading or prejudicing a party. (*Ono v. Chicago Park District* (1992), 235 Ill. App. 3d 383, 386-87, 601 N.E.2d 1172, 1175.) A party has a right to have the jury instructed on his theory of the case if raised by the evidence. (*Ono*, 235 Ill. App. 3d at 386-87, 601 N.E.2d at 1175.) Illinois Pattern Jury Instructions, Civil, No. 10.01 (3d ed. 1992) (hereinafter IPI Civil 3d), defines negligence as the "failure to do something which a reasonably careful person would do, or the doing of something which a reasonably careful person would not do, under circumstances similar to those shown by the evidence." IPI Civil 3d No. 11.01 defines contributory negligence as "negligence on the part of the plaintiff that proximately contributed to cause the alleged injury."

The basic concepts of negligence and contributory negligence do not cover a rescue doctrine situation. While a rescuer can be contributorily negligent, the contributorily negligent behavior is restricted to wanton or reckless behavior. Therefore, we find that the rescue doctrine instruction was necessary in light of the negligence and contributory negligence instructions given by the trial court. Although the trial court could have included the reckless or wanton language in the instruction, we do not find that the instruction was confusing. The instruction incorporated the word "reasonably," which is a term used in the negligence definition. We conclude that the trial court did not err in giving Shepherd's rescue doctrine contributory negligence instruction.

The Railroad next alleges that the trial court committed several errors which, individually or cumulatively, resulted in an unfair trial. We will address each alleged error separately.

First, the Railroad contends that the trial court erred in refusing its tendered instruction number 10 based upon a modified version of IPI Civil 3d No. 45.01. IPI Civil 3d No. 45.01 instructs the jury on the use of verdict forms. The trial court rejected this instruction because the instruction was inconsistent



with the directed verdict on liability against the Railroad. The Railroad argues that because this instruction was not given to the jury, no verdict form was submitted to the jury allowing them an option to return a defense verdict.

Before the trial court ruled upon the Railroad's tendered instruction number 10, the court previously ruled upon Shepherd's tendered instructions and verdict forms. The Railroad's instruction number 10 is inconsistent with Shepherd's verdict forms A and B, instructions number 17 and 18. Shepherd's verdict form A (instruction number 17) is a straight verdict form with no allowance for contributory fault. Shepherd's verdict form B (instruction number 18) is a verdict form with reduction for Shepherd's contributory fault. While the Railroad's tendered instruction number 10 references Shepherd's verdict form A, it does not contain a paragraph instructing the jury about Shepherd's verdict form B. Furthermore, this tendered instruction references a defense verdict form with which the jury was not instructed. As previously stated, the purpose of jury instructions is to advise the jury of the principles of law without being misleading. (*Ono*, 235 Ill. App. 3d at 386-87, 601 N.E.2d at 1175.) We find that the Railroad's tendered instruction number 10, purporting to instruct the jury on how to use the verdict forms, was inconsistent with the verdict forms provided to the jury and thus would have been confusing and misleading.

The Railroad connects the failure to give its tendered instruction number 10 to the fact that a defense verdict form was not provided to the jury. However, the record reflects that a defense verdict form was not given to the jury in this case because the Railroad did not tender one. A party cannot complain about the trial court's failure to give an instruction which the party never sought. *Auton v. Logan Landfill, Inc.* (1984), 105 Ill. 2d 537, 549, 475 N.E.2d 817, 821 (quoting *Humes v. United States* (1898), 170 U.S. 210, 211-12, 42 L. Ed. 1011-12, 18 S. Ct. 602-03).

The trial court's reasoning for the rejection of the Railroad's tendered instruction number 10 is impliedly related to the trial court's order sustaining Shepherd's motion for directed verdict. The trial court did not detail the rationale behind this ruling. To the extent that the trial court based its rejection of this instruction upon improper grounds, the trial court's rejection will stand if the decision is correct on any ground. (*Kingston v. Turner* (1987), 115 Ill. 2d 445, 455-56, 505 N.E.2d 320, 324.) Based upon the foregoing, we conclude that the trial court properly refused the Railroad's tendered instruction number 10.

The Railroad next contends that the trial court improperly allowed portions of Railroad employee Robert Hall's Missouri evidence deposition to be read into evidence at trial. Prior to trial, Shepherd served a Supreme Court Rule 237 (134 Ill. 2d R. 237) notice upon the Railroad requesting the appearance of several Railroad employees at Shepherd's trial. Robert Hall was one of these employees. After opening statements, Shepherd intended to begin the presentation of this case with Robert Hall's testimony. Robert Hall was not present at trial. Robert Hall was a Missouri resident, who had his own FELA action pending against the Railroad for injuries sustained when he fell in the open manhole. Initial arguments regarding Robert Hall's absence at trial were held off the record. The trial court allowed portions of Robert Hall's evidence deposition testimony to be read to the jury. This Missouri evidence deposition was taken by the Railroad in Robert Hall's own FELA action pursuant to Missouri Supreme Court Rule 57.07(3). From the record, it is clear that all parties and the court expected that Robert Hall would later appear to testify live. The trial court explained to the jury that Robert Hall's deposition was going to be read to provide the jury with factual background before other witnesses testified live.

The Railroad argues that the trial court allowed the reading of Robert Hall's deposition as a sanction for noncompliance with



Supreme Court Rule 237. This argument lacks merit because the record clearly indicates that the trial court did not sanction the Railroad for alleged noncompliance with the rule.

The Railroad further argues that Robert Hall's Missouri evidence deposition is inadmissible as an exception to the hearsay rule. We do not reach the merits of the Railroad's contention as we find that the Railroad waived consideration of the issue for failing to specify any reasons for its objection. An evidentiary objection must specify the bases for the objection. (*Hargrove v. Neuner* (1985), 138 Ill. App. 3d 811, 816, 485 N.E.2d 1355, 1359-60.) The record reflects that the Railroad objected to the trial court's imposition of a sanction and presented testimony on the issue of its compliance with Supreme Court Rule 237 but never presented grounds for an objection to the reading of Robert Hall's Missouri evidence deposition.

On this issue, we note that the Railroad cross-examined Robert Hall during his deposition regarding how this accident occurred, as the facts of the accident related to negligence, causation, and damages. The Railroad had the opportunity to read portions or the remainder of the deposition at trial pursuant to Supreme Court Rule 212(c) (134 Ill. 2d R. 212(c)) but apparently elected not to do so. Furthermore, if the trial court erred in allowing portions of Robert Hall's Missouri evidence deposition to be read at this trial, the Railroad fails to establish prejudice. Robert Hall testified about Shepherd's rescue. The jury heard testimony about the rescue from Shepherd and other witnesses. Therefore, Robert Hall's testimony provided no substantial new evidence. We find that the trial court did not err in admitting Robert Hall's Missouri evidence deposition testimony into evidence.

The Railroad next contends that the trial court erred by allowing Dr. Miller's testimony that Shepherd was "a solid citizen," "a really nice man," and "the type of person that I would like to have pull me out of a manhole." The trial court also

allowed Dr. Miller to testify to his opinion of Shepherd's truthfulness.

Generally, a witness is not allowed to personally assess another individual's credibility. (*People v. Goodwin* (1981), 98 Ill. App. 3d 726, 730, 424 N.E.2d 425, 428.) Furthermore, testimony of a party's truthfulness is admissible only where that party's character for truthfulness was assaulted upon cross-examination or by contradiction. (E. Cleary & M. Graham, Handbook of Illinois Evidence §608.2, at 406 (6th ed. 1994).) Testimony about a party's truthfulness must be based upon that party's reputation for truthfulness and cannot be based upon the opinion of the testifying witness. E. Cleary & M. Graham, Handbook of Illinois Evidence §608.3, at 407-08 (6th ed. 1994).

Shepherd's character and reputation for truthfulness were not at issue when Dr. Miller made his comments. We conclude that the trial court erred in not striking Dr. Miller's comments.

However, we do not find that Dr. Miller's comments were harmful. The jury was given IPI Civil 3d No. 2.01, instructing the jury to judge witness credibility. Proof of the accident and injuries sustained did not completely turn upon Shepherd's credibility. Other witnesses testified about how the accident occurred. Furthermore, all treating and examining physicians agreed that, at a minimum, Shepherd sustained a bulging disc.

A party alleging error in the admission of evidence must "overcome the burden of showing that the error materially affected the outcome of the trial." (*Cerveny v. American Family Insurance* Co. (1993), 255 Ill. App. 3d 399, 413, 626 N.E.2d 1214, 1224 (citing *Jackson v. Pellerano* (1991), 210 Ill. App. 3d 464, 471, 569 N.E.2d 167, 172, *appeal denied* (1991), 139 Ill. 2d 597, 575 N.E.2d 915.) On appeal, the courts may not presume hardship from the erroneous admission of evidence but must be convinced that the outcome was impacted by admission of that evidence. (*Cerveny*, 255 Ill. App. 3d at 414, 626 N.E.2d at 1224



(citing *Schaffner v. Chicago & North Western Transportation Co.* (1987), 161 Ill. App. 3d 742, 754, 515 N.E.2d 298, 305, *aff'd* (1989), 129 Ill. 2d 1, 541 N.E.2d 643.) Admission of Dr. Miller's comments regarding Shepherd's character and his truthfulness was erroneous, but the resulting harm, if any, does not mandate reversal.

The Railroad also contends that the trial court erred in striking its cross-examination of Dr. Holeman about possible contributing causes of Shepherd's depression. Specifically, the Railroad asked Dr. Holeman if Shepherd could have suffered psychiatrically from the death of his parents, his brother's drug and alcohol problems, and sustaining a gunshot wound when protecting his home and family from a burglar.

In this case, Shepherd's father died 20 years before this accident. There was no evidence regarding Shepherd's relationship with his mother and whether her death was likely to cause depression. The gunshot wound occurred three years before the accident, and Shepherd did not treat with anyone for depression or other psychiatric problems following his release from the hospital. There was no testimony about when Shepherd's brother had problems with alcohol and drug addiction.

The record reflects that the trial court carefully considered the introduction of this information. The events at issue were remote in time to the accident which brought about this suit. Dr. Holeman indicated in his deposition that he discounted these traumatic events as being causally connected to Shepherd's current psychiatric condition. Additionally, the record clearly showed that Shepherd sought no treatment and did not claim to have suffered depression before this accident. The Railroad offered no medical expert or lay witness testimony to establish a causal link between these events and Shepherd's depression and/or to establish a prior history of depressive symptoms.

Limitation of a medical expert's cross-examination rests within the sound discretion of the trial court. (*Sears v. Rutishauser* (1984), 102 Ill. 2d 402, 407-08, 466 N.E.2d 210, 213.) In balancing the potential probative value against the prejudicial effect of such questions, we do not find that the trial court abused its discretion.

The Railroad next contends that the trial court erred in denying the Railroad's Supreme Court Rule 206(d) (134 Ill. 2d R. 206(d)) motion to restrict the scope of Dr. Patrick Hogan's cross-examination. Dr. Hogan was retained by the Railroad as its Supreme Court Rule 215 (134 Ill. 2d R. 215) expert to examine Shepherd, review medical records, and render opinions. Dr. Hogan's deposition began on February 4, 1992. On cross-examination, Shepherd's attorney asked Dr. Hogan about neurological findings and opinions related to 12 other patient examinations. Those patients were referred to Dr. Hogan by the Railroad's attorneys. The Railroad's attorneys terminated the deposition. The Railroad filed a Supreme Court Rule 206(d) motion which the trial court denied, finding that this cross-examination was appropriate. The Railroad sought a supervisory order from our supreme court on this issue. The supreme court rejected the Railroad's request.

In *Moore v. Centreville Township Hospital* (1993), 246 Ill. App. 3d 579, 588, 616 N.E.2d 1321, 1328, *reversed on other grounds* (1994), 158 Ill. 2d 543, 634 N.E.2d 1102, this court held that other plaintiff examination reports prepared by the defendant's Supreme Court Rule 215 medical expert were admissible in evidence for impeachment purposes. Counsel must be given wide latitude during cross-examination to demonstrate the expert witness's interest, bias, or motive. (*Sanchez v. Black Brothers Co.* (1981), 98 Ill. App. 3d 264, 271, 423 N.E.2d 1309, 1315.) Limitation of cross-examination of a medical expert is within the trial court's discretion. (*Moore*, 246 Ill. App. 3d at 588, 616 N.E.2d at 1328.) We find that impeachment of Dr.



Hogan with other patient reports is allowable. Cross-examination of Dr. Hogan regarding these reports falls short of the admission of other patient reports as was allowed in *Moore*. The scope and length of such cross-examination is ultimately within the trial court's discretion. The trial court did not err by denying the Railroad's Supreme Court Rule 206(d) motion.

The Railroad also argues that the trial court erred in excluding Dr. Hogan's partial evidence deposition at trial. After the trial court denied the Railroad's Supreme Court Rule 206(d) motion, the Railroad sent Shepherd's attorneys a notice of the continuation of Dr. Hogan's deposition. The remainder of this deposition was scheduled for Saturday, May 16, 1992. The Railroad did not seek leave of court to take the Saturday deposition pursuant to Illinois Supreme Court Rule 206(a)(2) (134 Ill. 2d R. 206(a)(2)). Shepherd's attorneys notified the Railroad's attorneys that a Saturday deposition was not agreeable. The Railroad did not reschedule Dr. Hogan's deposition before trial. Trial commenced 14 months later in August 1993. At trial, the Railroad sought to introduce Dr. Hogan's partial evidence deposition. The trial court sustained Shepherd's motion *in limine* and barred the use of Dr. Hogan's deposition. The trial court stated that the Railroad could bring Dr. Hogan to testify live at trial. Dr. Hogan did not testify at trial.

The Railroad argues that after the disagreement on the Saturday deposition date, Dr. Hogan was not available at any other time between May 16, 1992, and the original June 1992 trial date. The case was continued and was not tried until August 1993.

According to Illinois Supreme Court Rule 206(c)(2) (134 Ill. 2d R. 206(c)(2), an evidence deposition includes both examination and cross-examination. Dr. Hogan's partial deposition lacked complete cross-examination. Dr. Hogan was the Railroad's expert medical witness. The Railroad was obviously aware that Dr. Hogan's deposition was incomplete. During the 14 months from the original scheduled deposition until trial, the Railroad

did not seek a court order authorizing a Saturday deposition and made no attempts to reschedule the deposition. If the Railroad desired Dr. Hogan's testimony at trial, it was incumbent upon the Railroad to complete his evidence deposition pursuant to Illinois Supreme Court Rule. The trial court, while barring the use of the partial deposition, allowed the Railroad to call Dr. Hogan at trial. Unfortunately, Dr. Hogan did not testify at trial. We find no error in the trial court's order barring the use of Dr. Hogan's partial evidence deposition.

The Railroad finally contends that the jury verdict was excessive. The itemized verdict assessed damages as follows:

| | |
|---|---|
| Past Lost Earnings: | $163,038 |
| Future Lost Earnings: | $372,000 |
| Past Pain and Suffering: | $ 50,000 |
| Future Pain and Suffering: | $125,000 |
| Future Medical Expenses: | $ 45,000 |
| Disability: | $100,000 |
| TOTAL SUM | $855,038 |

Following entry of judgment on the jury's verdict, the Railroad sought a setoff of $55,285.39 representing wages paid to Shepherd as a benefit during the time he was off work due to his injury. On July 8, 1994, the trial court granted the Railroad's motion and reduced the judgment accordingly.

"The very nature of personal injury cases makes it impossible to establish a precise formula to determine whether a particular award is excessive. (*Ball v. Continental Southern Lines, Inc.* (1976), 45 Ill. App. 3d 827, 831, 360 N.E.2d 81, 84 (quoting *Rogers v. Gehrke* (1966), 77 Ill. App. 2d 343, 345, 222 N.E.2d 351, 352).) Determining whether a verdict is adequate is within the jury's province, and we must give that determination great



weight. (*Ball*, 45 Ill. App. 3d at 831, 360 N.E.2d at 84.) Unless the verdict falls outside the limits of fair and reasonable compensation or its size shocks the conscience or results from passion or prejudice, a reviewing court will not disturb the verdict. (*McMahon v. Richard Gorazd, Inc.* (1985), 135 Ill. App. 3d 211, 230, 481 N.E.2d 787, 800; *Templeton v. Chicago & North Western Transportation Co.* (1993), 257 Ill. App. 3d 42, 61, 628 N.E.2d 442, 455.) FELA jury verdicts should only be reversed if there is a complete absence of probative facts supporting the verdict. *Bowman v. Illinois Central R.R. Co.* (1957), 11 Ill. 2d 186, 201, 142 N.E.2d 104, 114, *cert. denied* (1957), 355 U.S. 837, 2 L. Ed. 2d 49, 78 S. Ct. 63.

Our review of the record indicates that the injuries suffered by Shepherd were not speculative. The jury heard testimony that Shepherd was permanently disabled. The Railroad presents nothing that compels a conclusion that the verdict was excessive. The court will not substitute its judgment for the jury's judgment. (*Bridgeman v. Terminal R.R. Association* (1990), 195 Ill. App. 3d 966, 975, 552 N.E.2d 1146, 1151, *appeal denied* (1990), 132 Ill. 2d 543, 555 N.E.2d 374.) The amount of the award is not excessive. The verdict does not shock the judicial conscience. There is no basis in the record to support a claim that the verdict size resulted from jury prejudice or passion. Therefore, we reject the Railroad's claim that the verdict was excessive.

For the foregoing reasons, we affirm the judgment of the circuit court of Madison County.

Affirmed.

KUEHN, J., with GOLDENHERSH and RARICK, JJ., concurring.

## APPENDIX C

THE CIRCUIT COURT
FOR THE THIRD JUDICIAL CIRCUIT
Madison County, Illinois
CASE NO. 89-L-1840 P. 2

DIVISION illegible

| JUDGE | DATE | ORDERS OF COURT |
|---|---|---|
| | | * * * |
| A.A. Matoesian | 8 23 93 | Case called for jury trial. Pltf. appears in open court with counsel, Steve Tillery. Deft. appears through counsel, Tom Jones and Mike Clark. Voir Dire examination conducted. Pretrial motions heard. Court adjourned for the day. |
| A.A. Matoesian | 8 24 93 | Court reconvened pursuant to adjournment. Parties present with counsel. Jury sworn. Opening statements presented by both sides. Evidence presented on behalf of the Pltf. Court adjourned for the day. |
| A.A. Matoesian | 8 25 93 | Court reconvened pursuant to adjournment. Parties present with counsel. Further evidence presented on behalf of Pltf. Pltf. rests. Deft. motion for directed verdict at close of Pltf.'s evidence argued and denied. Court adjourned for the day. |



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| A.A. Matoesian | 8 26 93 | Court reconvened pursuant to adjournments. Parties present with counsel. Evidence heard on behalf of the Deft. Deft. rests. Rebuttal evidence presented on behalf of Pltf. Pltf. rests. Deft.s motion for directed verdict argued and denied. Pltf.s motion for directed verdict on the issue of liability argued and allowed. Court adjourned for the day. |
| A.A. Matoesian | 8 27 93 | Court reconvened pursuant to adjournment. Parties present with counsel. Instruction conference held between Court and counsel. Closing arguments presented. The Court instructs the Jury. The Jury retires to deliberate its verdict at 2:00 pm, and returns its verdict at 8:15 pm. AS FOLLOWS: We, the jury, assess the damages itemized as follows Plat Lost Earnings $163, 038.00. Future Lost Earnings $372,000.00. Past Pain & Suffering $50,000. Future Medical Expenses $45,000.00. Disability $100,000.00. Total Sum $855.038.00. Jury ordered discharged. Judgment entered on said Verdict. |
| | | * * * |